No. 583.

Petition for Rehearing.

Rec'd & Dft. May 21, 1898.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

JOHN ANDERSEN, PLAINTIFF IN ERROR,
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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

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John Andersen, the plaintiff in error in the above entitled suit, respectfully asks the rehearing of the above entitled cause on the grounds set out below:

1. This Honorable Court having duly considered at length every ground of error and having evidently given the case the deepest, closest and most careful consideration, as appears by the opinion filed in this matter, on the 9th day of May, 1898, his counsel would ordinarily feel inclined to acquiesce in the ruling without further discussion.

But owing to the fact that human life is at stake and it is probable that the case was not presented by counsel for the plaintiff in error as its merits deserved or its importance required, he further would call attention to the ruling on three assigned grounds of error.

1. The opinion (page 16) in discussing the admissibility of certain evidence offered by the prisoner says :

"The point to be considered is whether evidence of transactions previous to that day was admissible in the light of the testimony of the accused in respect of what passed on that day. It will be perceived that no specific offer of proof was made. But, assuming that counsel had offered to show by the accused that he had had trouble with the mate previously to August 6th and that the day before he had had a difficulty with him, and the mate, without provocation, had attempted to throw the accused overboard, would such testimony by the accused have been admissible in view of his own detailed account of the homicide and its surrounding circumstances? On what legal principle could it have been held to have a tendency in justification, excuse or mitigation?"

It is admitted that this fairly and squarely presents the issue. The Court then recites the testimony as given by Andersen and presents an epitomized statement of what took place, made by Andersen himself and what he said. It then infers from that statement that Andersen was the aggressor, the premeditated aggressor and stated from Andersen's statement "the inference is irresistable, that to avert the danger of the gallows Andersen killed the mate—cast his body into the sea, and burned the ship;" states that there can be no pretence whatever that he was acting under a reasonable belief that he was under great bodily harm.

The conclusion drawn from this by the court, is that it offered no basis for the introduction of evidence of prior provocation, or of injuries previously inflicted, for no overt act on the mate's part provoked the evil intent for which Andersen sought him out on this occasion.

It is respectfully submitted that the proffer of evidence contained in the 6, 7 and 8 assignment of error (pages 15–16 of the opinion) were for the very purpose of showing that the previous transactions between these two men were such as to lead Andersen to believe that he was in imminent danger of death or great bodily harm at the hands of the

mate. While it might be said that there can be no *pretence* that he was in such fear from the testimony which was *admitted*, it was our purpose to show by the *testimony which was excluded* that such a fear did exist and rationally existed.

The questions were intended to show brutality on the part of a superior officer. One of them was whether this mate had not on the day previous without provocation on Andersen's part attempted to throw him overboard. This we regarded as a "*specific offer*" of proof to that effect and it is submitted that where one man attempts to throw another overboard, an officer of the ship, one standing in authority over the sailor acts in such an inhuman and brutal manner that that sailor should on his trial for the murder of the mate be permitted to prove acts of a brutal nature done to him by his officer, especially where they are a part of a series of continued and connected transactions all leading up to the homicide, and further that Andersen did not seek him with wrongful intent, but was not permitted to so show. Every thing but what occurred on August 6th being ruled out. While it is true that the Court looking *alone* at Andersen's testimony which was *admitted* may fail to see any provocation or such a state of terrorism on the part of the accused as to render him demented and beyond the pale of reason, it is submitted that that accused should be permitted to show that such condition of affairs existed, and was *brought about* by the *brutality* and the *violence* of the person of whose murder he is accused. All this was excluded by the ruling of the Lower Court. The proof to this effect was offered at four distinct stages of the proceedings and while perhaps it was proper that it should have been excluded in the preliminary stages, still *after* the statement of the facts by Andersen of the occurrences on August 6th had been given, is it not just to him that he should be permitted to give the reason for these occurrences, the facts that lead up to them, the condition of affairs which brought about his feeling of fear of the mate? and above all, were they not proper circumstances for the *jury* and not for the Court to consider?

While this Court might claim that the provocation was insufficient and that there could be no state of terrorism brought about by any such acts which would justify the commission of the homicide itself, still is not *this* a question for the jury, and should not the jury have been permitted to pass upon it?

Why should a rule limiting transactions to *the day* of the alleged homicide be adopted? If any act bore upon the transaction, no matter how remote, why should it be excluded from the consideration of the jury because it happened anterior to August 6, 1897?

2. The second point to which I would call the attention of the Court is the question of the charge which excluded the consideration of the fact of manslaughter from the jury. It is very true that Justice McKenna gave this instruction in the case of St. Clair, 154 U. S., which was reaffirmed by this Court, and that it was also reaffirmed in Sparfs' case 156, U. S., and was quoted approvingly in Stevenson's case, 162 U. S.

Sparfs' case is to the effect that a jury would not be justified in finding a verdict of manslaughter if there were *no* evidence to support such a finding and in that event the court would have the right to instruct the jury to that effect.

Sparfs' case and St. Clair's case on the one hand and the case at bar on the other are as far apart as the poles. There was no pretence in Sparfs' case and St. Clair's case of any struggle, of any hostility or any mutual combat or any hostile demonstrations between the parties to the fray. Three sailors formed a conspiracy to throw the mate overboard, which they did. There was no proof whatever of any hostile attack by the mate upon them or no act on his part, however slight, by which any demonstration could be inferred.

In Stevenson's case, on the contrary, there was evidence tending to show hostile demonstrations and acts on the part of the deceased towards the accused, as it was in Andersen's case.

Can it be said that there was not *some* evidence to this effect? It need not be uncontradicted, but was not its proper

weight to be given to the jury to determine? Stevenson's case says further *any* evidence which *might tend* to bring the crime within the grade of manslaughter that the charge which excluded it was improper, and this was the ruling, notwithstanding the fact that the evidence *might be overwhelming* to show that the killing was in fact murder and not manslaughter. Is not this same case to the effect that a charge, as this charge was given, is improper so long as there is *some evidence* relative to the issue of manslaughter, and we submit that this question is a question for the jury, and while the Court might draw its conclusions as to its weight and as to the propriety of a jury's drawing a conclusion in favor of a verdict of manslaughter, still it has right so to do if there is any evidence relative to that issue in the record, otherwise the Court usurps the province of the jury and renders their functions useless.

3. I beg again to refer to the testimony of the witness Hall (top page 15 of the record). It is suggested that this was not made a matter of exception at the trial and the evidence on that point is quoted on page 11 of the opinion.

The matter occurred in this way:

"Q. Is it customary in loading veesels with a deck load of lumber to leave passageways or stairways to go down in different parts of the vessel?

A. We most always do that when we can, when the lumber comes right, but sometimes we have to go right over it when we can't.

Q. Are you or not familiar with the deck load of the "Oliver Pecker" when she sailed from Boston on the 20th day of June?

A. No, I don't know anything about that.

Counsel for the accused moves to strike out all testimony as to the condition of the vessel at the time of the casualty.

Mr. White. I have asked him nothing about that. He is simply *describing the deck in view of his familiarity with the vessel* and what can be seen from one portion of it to the

other, and whether or not if lumber was upon it whether a view could be had over it.

Mr. McIntosh. And it is *on that very point that I wish to make the objection*, claiming that a *hypothetical question* put to a witness in a criminal trial is improper unless it is proved that the hypothesis exists in point of fact. I take it that there is no better rule of evidence known to the criminal law. Mr. White, after putting these hypothetical questions as to the *deck load* and the *condition of affairs* under a certain state of hypothesis, finally winds up by asking if he knows anything about the deck load in this particular case. He is not acquainted with the condition of the vessel, and I say therefore that all previous statements made by him as to her condition are entirely improper.

Judge Goff. If I understand it he has testified as to the condition of the deck—

Mr. McIntosh (interrupting). As loaded at the time of the alleged occurrence.

Judge Goff. The Court does not understand that he has so testified. Anything that would bear that construction, as a matter of course, will be excluded from the jury. I think that it is eminently proper that the jury should understand the character of the vessel. This man is familiar with it, he built it and has commanded it. He is detailing to the jury nothing that took place at the time of the alleged offence. *He is giving the general character and situation of the vessel so that you may understand it, which I think is eminently proper.* As he was not on the vessel at the time of this occurrence the Court will not permit him to testify about anything that took place then.

To which ruling of the Court the prisoner excepted."

Judge Goff in his ruling (p. 15 of the record) evidently meant to exclude all testimony of the witness Hall which related to the deck load of the vessel at the time of the homicide, on the ground that the witness had himself declared that he knew nothing of its condition at that time, not being present. His Honor says "The Court does not understand

that he has so testified, anything that would bear that construction will, as matter of course, be excluded from the jury. I think it eminently proper for the jury to understand the character of the vessel." The Court will bear in mind that we were discussing the answer to the question "Is it customary, etc." which I intended to move to strike out. Judge Goff then goes on to say "This man is familiar with it, he built it, he is detailing to the jury nothing what took place at the time of the alleged offence, *he is giving the general character* and situation of the vessel, so that you may understand it, which I think eminently proper," and as he was not on the vessel at the time of the occurrence, the Court will not permit him to testify about anything which took place then," to which ruling of the Court the prisoner excepted.

I submit that all of Judge Goff's ruling had reference to the question "Is it customary, etc." He would not permit Hall to say what took place at the time of the transaction, because Hall had admitted that he was not there and knew nothing about it, but he did permit Hall to give the custom of loading vessels as answered by him and it was to this ruling so permitting this answer to stand that the prisoner by his counsel excepted, otherwise why should he except at all to Judge Goff's ruling.

The ruling forbidding him to testify as to the condition of the deck load at the time of the homicide, when he was not present, was in the prisoner's favor, and surely it cannot be construed that the exception taken on page 15 should refer to that. If it did not, to what did it refer?

Why it referred to the ruling of the Court in permitting him to answer the question as to what was customary. Judge Goff himself states in his opinion (p. 15) to what it referred. "He is giving the general situation of the vessel so that you may understand it, which I think is eminently proper, as he was not on the vessel at the time of this occurrence the Court will not permit him to testify about anything which took place then."

But the Court did permit him to testify as to what

was customary, whether it was customary in loading vessels to do certain things, to which ruling of the Court the prisoner excepted.

I again submit, therefore, that the testimony admitted by Judge Goff by this ruling on page 15 of the record, namely, "as to what is customary" or "what was customary" in loading vessels, was improperly admitted, and that such ruling of the Court was excepted to.

All of which is respectfully submitted.

JOHN ANDERSEN,
By GEORGE McINTOSH,
His Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1897.

JOHN ANDERSEN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 583.

I, George McIntosh, a member of the bar, practicing in the Supreme Court of the United States, and in all the Federal Courts in the Fourth Circuit, and attorney for the plaintiff in error in the foregoing petition in the above entitled cause, do hereby certify that I have carefully examined the opinion and decision of the Supreme Court of the United States, rendered May 9th, 1898, and that in my opinion the same is erroneous in respect to the matters overlooked, and wherein it is alleged there are errors in the foregoing petition.

GEORGE McINTOSH,
Attorney for the Plaintiff in Error.